No. 42420-7-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

TALYN BENITEZ,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE GORDON L. GODFREY, JUDGE

BRIEF OF RESPONDENT

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TABLE

Table of Contents

TABLE OF AUTHORITIES

Table of Cases

STATUTES

Table of Court Rules

OTHER

I. COUNTER STATEMENT OF THE CASE

A. Procedural History

The defendant was charged by Amended Information on May 9, 2011 with one count of Indecent Exposure contrary to RCW 9A.88.010. (CP 1-2). The offense was elevated to a felony due to the allegation that the defendant had previously been convicted of a sex offense. (CP 1-2). The State further alleged that the defendant had committed the crime with sexual motivation and that he had been recently released from incarceration. (CP 1-2). The defendant waived his right to a jury and the case was tried to the bench. (Supp. CP). The defendant was found guilty as charged on May 24, 2011. (CP 3-7). The defendant was sentenced on July 25, 2011. (CP 10-21).

B. Factual Background

The State relies on the findings of fact entered by the trial court. (CP at 3-7). The court's findings are unchallenged by the defendant and, therefore, are verities on appeal. *State v. Pauling*, 149 Wash.2d 381, 391, 69 P.3d 331, cert. denied, 540 U.S. 986, 124 S.Ct. 470, 157 L.Ed.2d 379 (2003).

II. RESPONSE TO ASSIGNMENTS OF ERROR

A. The defendant's conviction for Child Molestation in the First Degree is a "sex offense" for purposes of RCW 9A.88.010.

Per RCW 9A.88.010, "A person is guilty of indecent exposure if he

or she intentionally makes any open and obscene exposure of his or her person or the person of another knowing that such conduct is likely to cause reasonable affront or alarm." RCW 9A.88.010(1). Indecent Exposure is elevated to a felony if the defendant "has previously been convicted...of a sex offense as defined in RCW 9.94A.030." RCW 9A.88.010(2)(c).

"'Conviction' means an adjudication of guilt pursuant to Title 10 or 13 RCW and includes a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty." RCW 9.94.A.030(9). "Sex offense," as pertinent to this case is defined as "[a] felony that is a violation of chapter 9A.44 RCW other than RCW 9A.44.132." RCW 9.94A.030(46)(a)(I). Child Molestation in the First Degree is a Class A felony contained within chapter 9A.44 RCW. RCW 9A.33.083(2).

The defendant argues that, pursuant to *State v. Schaaf*, 109 Wash.2d 1, 743 P.2d 240 (1987) and *In re Frederick*, 93 Wash.2d 28, 604 P.2d 953 (1980), the defendant's juvenile conviction for Child Molestation in the First degree is not a "felony" and therefore does not qualify as a "sex offense" for purposes of the Indecent Exposure statute. Appellant's Brief at 6-7. However, RCW 9A.88.010 does not require that the State prove that the defendant has a prior "felony" conviction, only that he has a prior conviction for a "sex offense."

In *State v. McKinley*, the defendant appealed his conviction for unlawful possession of a firearm in the first degree, "arguing that his prior

juvenile adjudication of guilt of second degree robbery did not constitute a predicated conviction for purposes of the unlawful possession of a firearm statute, and thus the evidence was insufficient to support his conviction." *State v. McKinley*, 84 Wash.App. 677, 678, 929 P.2d 1145 (1997). McKinley cited to *State v. Schaaf* and *In re Frederick* "in support of his argument that a juvenile cannot be 'convicted' of a crime." *State v. McKinley*, 84 Wash.App at 680.

The court found this reliance misplaced finding that in these cases, "the Supreme Court held that a juvenile offender cannot be convicted of a *felony*" *McKinley* at 680-681; *State v. Schaaf*, 109 Wash.2d at 8; *In re Frederick*, 93 Wash.2d at 30. Pertinent to the case at bar, the *McKinley* court went on to hold that "[the unlawful possession of a firearm statute], however does not speak in terms of felonies. It required only that an offender have previously been convicted of a "serious *offense*...The term 'offense' applies equally to adult and juvenile crimes." *Id.;* RCW 9.41.040(1)(a); *See In re A, B, C, D, E*, 121 Wash.2d 80, 87, 847 P.2d 455 (1993).

In *State v. Cheatham*, the defendant was found guilty of unlawful possession of firearms by the juvenile court. This offense was predicated on a prior juvenile disposition for second degree burglary. *State v. Cheatham*, 80 Wash.App. 269, 271, 908 P.2d 381 (1996). The defendant argued the language of former RCW 9.41.040 was insufficiently precise to incorporate prior juvenile offenses, and, "therefore, it only prohibits

possession of firearms by persons with prior adult convictions." *State v. Cheatham*, 80 Wash.App. at 271.

The court agreed with Cheatham that under *Frederick* and the Juvenile Justice Act (JJA), a juvenile cannot be convicted of a crime or a felony; however, the court did not agree "that these observations constrain us to hold that former RCW 9.41.040 does not incorporate, as predicate offenses, prior juvenile adjudications for offenses that would be crimes of violence or felonies involving a firearm if committed by an adult." *State v. Cheatham* at 273. The most obvious distinction, that is not germane to the current case, is that former RCW 9.41.040 made specific reference to juveniles. *Id.*

However, the same analysis should apply in this case. "The penalty, rather than the criminal act committed, is the factor that distinguishes the juvenile code from the adult criminal justice system." *State v. Schaaf* at 8-9; *See State v. Bird* 95 Wash.2d 83, 95, 622 P.2d 1262 (1980). "Thus, the distinguishing feature between a juvenile offense and an adult offense is its consequences, not its definition." *Id.* at 276. The statute at issue here, RCW 9A.88.010, defines a substantive offense, it does not establish a penalty or a disability for a criminal act. This is the same as the statue analyzed in *Cheatham*. The *Cheatham* court found that "[e]ven if juveniles cannot technically be convicted of crimes or felonies, the mere fact that the statute uses the terms "crime" or "felony" in defining a juvenile offense does not preclude applying that statute to juveniles." *Id.*

The *Cheatham* court also pointed out:

> ...that the adult criminal code, the JJA and the relevant case law are replete with references to 'juvenile felonies' and 'misdemeanors.' Under [the defendant's] approach, any time the Legislature has referred to a juvenile offense without explaining that it means an offense which, if committed by an adult would be a felony or a misdemeanor, that provision would not apply to juveniles. *See, e.g.*, RCW 13.40.020(18) (defining a "minor or first offender" as a person whose current offense(s) and criminal history include various combinations of misdemeanors, gross misdemeanors and felonies); RCW 13.40.110(1)(a) (motion to transfer juvenile to adult court may be brought where respondent is 15 or over "and the information alleges a class A felony or an attempt, solicitation, or conspiracy to commit a class A felony"); RCW 9.94A.030(12)(b) (adult offender's criminal history includes "prior convictions in juvenile court if: (I) The conviction was for an offense which is a felony or a serious traffic offense and is criminal history as defined in RCW 13.40.020(9)"). If we were to accept [the defendant]'s argument that a juvenile offense cannot be classified or referred to as a felony or a crime, we would be nullifying countless provisions of both the adult criminal code and the JJA.

Id. at 276-277.

In addition, this Court has found that a juvenile adjudication of guilty for Child Molestation in the First degree is a "sex offense" under RCW 9.94A.030. In *State v. Acheson*, the defendant, at age 14, pled guilty to one count of Child Molestation in the First Degree and was ordered to comply with the Sex Offender Registration Act. *State v. Acheson,* 75 Wash.App. 151, 152, 877 P.2d 217 (1994).

Acheson appealed this order, focusing his argument on the meaning of "sex offense" which, as in the case at bar, meant "any sex

offense defined as a sex offense by RCW 9.94A.030." *State v. Acheson*, 75 Wash.App. at 153. Acheson contended that "the Legislature did not intend to require that juveniles register because juveniles cannot be 'convicted' of anything and juveniles cannot commit a 'felony,' only an 'offense.'" *Id.*

As in RCW 9A.88.010, the statute at issue in *Acheson* "does not require that the defendant be convicted of a "felony." Instead the language of the statute requires that the defendant "has previously been convicted...of a ***sex offense*** as defined in RCW 9.94A.030." RCW 9A.88.010(2)(c). A "conviction," as defined above by statute, encompasses an adjudication of guilt by the juvenile court. RCW 9.94A.030(9).

In sum, the defendant's juvenile adjudication for Child Molestation in the First Degree is a sex offense; therefore, his conviction for Indecent Exposure must be elevated to a class C felony. It is clear that the Legislature intended to increase the punishment for offenders that had committed other criminal sexual misconduct in their past. To this end, it is irrelevant what punishment the defendant received. The defendant committed the acts that constitute Child Molestation in the First Degree, therefore, he faces more serious punishment in this case.

B. The law of the case doctrine does not apply in a case tried to the bench.

The defendant asks this Court to apply the law of the case doctrine to bench trials. However, existing case law makes it clear that this is not an appropriate application as law of the case is linked to elements inadvertently inserted into jury instructions.

Under the law of the case doctrine, jury instructions not objected to become the law of the case. *State v. Hickman,* 135 Wash.2d 97, 101-102, 954 P.2d 900, 902 (1998); see *State v. Hames,* 74 Wash.2d 721, 725, 446 P.2d 344 (1968) (" 'The foregoing **instructions** were not excepted to and therefore, became the law of the case.' ") (quoting *State v. Leohner,* 69 Wash.2d 131, 134, 417 P.2d 368 (1966)); *State v. Salas,* 127 Wash.2d 173, 182, 897 P.2d 1246 (1995) ("[I]f no exception is taken to **jury instructions**, those **instructions** become the law of the case."). In criminal cases, the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the **"to convict" instruction**. *State v. Lee,* 128 Wash.2d 151, 159, 904 P.2d 1143 (1995) ("Added elements become the law of the case ... when they are included in **instructions to the jury**.") (citing *State v. Hobbs,* 71 Wash.App. 419, 423, 859 P.2d 73 (1993); *State v. Rivas,* 49 Wash.App. 677, 683, 746 P.2d 312 (1987)). *See also State v. Barringer,* 32 Wash.App. 882, 887-88, 650 P.2d 1129 (1982) ("Although the

charging statute ... did not require reference to [the added element], by including that reference in the information and in the **instructions**, it became the law of the case and the State had the burden of proving it.") (citing *State v. Worland,* 20 Wash.App. 559, 565-66, 582 P.2d 539 (1978)), *overruled in part on other grounds by State v. Monson,* 113 Wash.2d 833, 849-50, 784 P.2d 485 (1989) (emphasis added).

Divisions I and III clearly affirm the State's position that the law of the case doctrine does not apply to cases tried to the bench, as there are no jury instructions in which additional elements can be inserted.

Division I examined this issue in *State v. Hawthorne.* In the *Hawthorne* case, the defendants were charged with conspiracy to violate the Uniform Controlled Substances Act; however, the State had added language regarding an "overt act" that was not a statutory element of the crime. *State v. Hawthorne*, 48 Wash.App. 23, 26, 737 P.2d 717 (1987). The defendants waived a jury trial and were convicted at a bench trial.

On appeal, the defendants argued that "if the State includes an item in the information it becomes an element that must be proved by the State." *State v. Hawthorne,* 48 Wash. App. at 27. The defendants relied on the law of the case doctrine as discussed in *State v. Worland*, 20 Wash.App. 559, 582 P.2d 539 (1978) and *State v. Barringer*, 32 Wash.App. 882, 650 P.2d 1129 (1982) to support this proposition.

The court found this reliance misplaced because "[i]n those cases the added elements were also included in instructions to the jury, at which

time they became the law of the case...here the defendants had waived a jury trial and the rule in *Worland* and *Barringer* is inapplicable. *State v. Hawthorne* at 27; *See State v. McGary*, 37 Wash.App. 856, 860, 683 P.2d 1125 (1984).

Division III came to the same holding in *State v. Munson*, an appeal after a bench trial. In *Munson*, the State charged the defendant with leading organized crime. The Information alleged three alternative means and three alternate predicate crimes using the conjunctive "and" versus the disjunctive "or". *State v. Munson*, 120 Wash.App. 103, 106, 83 P.2d 1057 (2004). On appeal, the defendant argued that the State had to prove **all** the alternative means and predicate offenses as that is what he was charged with. *State v. Munson*, 120 Wash.App. at 107. Munson cited to *State v. Hickman* to support his position. *State v. Munson* at 107-108.

The court held that "[t]he inclusive list of predicate offenses charged do not become necessary elements of the single crime of 'leading organized crime' simply because the State used the word 'and' between the three predicate crimes charged in the information." *Id.* The court observed that *Hickman* was tried to a jury, but there was no jury in this case. "And there was therefore no opportunity to add unnecessary elements which the State then had to prove." *Id.*

The defendant argues that not applying the law of the case doctrine at a bench trial violates equal protection. However, there is scant argument and authority offered to support this argument. Therefore, the

State asks that they not be considered. The Court will not consider an assignment of error that is unsupported by argument or citation of authority. See RAP 10.3(a)(6); *State v. Farmer*, 116 Wn.2d 414, 433, 805 P.2d 200 (1991). Further, it is clear that this outcome would comply with the requirements of the rational basis test.

The defendant was not treated any differently than any other defendant. The law of the case doctrine applies to jury instructions; therefore, it does apply equally to all adult defendants, the defendant in this case simply waived his right to have a jury.

As the law of the case doctrine does not apply in this case, the State was not required to prove that the defendant intentionally exposed himself "to another." Even if the doctrine applied, the intentional act that must be proved is the exposure, not the being seen. In this case, the evidence shows that the defendant was standing in a public alleyway and was seen by another. This would prove the elements alleged in the Amended Information.

C. The waiver of jury trial was proper in this case.

Criminal defendants enjoy a state constitutional right to a jury trial. Wash. Const. art. 1, sec. 21; *State v. Stegall*, 124 Wash.2d 719, 728, 881 P.2d 979 (1994). Waiver may be made only by a knowing, intelligent, and voluntary act, and is valid only upon a showing of either defendant's personal expression or an indication the court or defense counsel has

discussed the issue with the defendant before the attorney's own waiver. *Stegall*, 124 Wash.2d at 724-25, 729, 881 P.2d 979. Absent an adequate record to the contrary, courts must presume a valid waiver did not occur. *State v. Wicke*, 91 Wash.2d 638, 645, 591 P.2d 452 (1979). Both the right to a jury, as well as the right to a 12-person jury, are protected by article 1, section 21 of the state constitution. *State v. Stegall*, supra.

Washington courts have long recognized the validity of jury waivers where the trial court did not advise the defendant that he or she had the right to participate in jury selection, that the jury must be impartial, and that the jury would presume the defendant innocent until that presumption is overcome. In *State v. Brand*, the reviewing court upheld the jury waiver as valid where the colloquy only generically addressed waiving the right to a jury. *State v. Brand,* 55 Wash.App. 780, 780 P.2d 894 (1989), review denied 114 Wash.2d 1002, 788 P.2d 1077, grant of post-conviction relief reversed 65 Wash.App. 166, 828 P.2d 1, review granted 119 Wash.2d 1013, 833 P.2d 1390, reversed 120 Wash.2d 365, 842 P.2d 470, reconsideration denied. There was no mention of the number of jurors, that they would have to agree on a verdict, or that the defendant would be able to participate injury selection. Id. at 789-90.

Similarly, in *State v. Valdobinos*, the court upheld the validity of the jury waiver where the colloquy consisted of the court asking whether the defendant understood he was "giving up [the] right to a jury trial," conferring with counsel, then acknowledging that he was giving up this

right. *State v. Valdobinos*, 122 Wash.2d 270, 858 P.2d 199 (1993). There was no mention even of the number of jurors vis-à-vis the judge, or that the jurors would all have to agree on the verdict. Id. at 287-8.

In *State v. Lund*, the court's colloquy only advised the defendant that he was giving up the right to have 12 persons hear his case, rather than one judge. *State v. Lund,* 63 Wash.App. 553, 821 P.2d 508, review denied 118 Wash.2d 1028, 828 P.2d 563 (1991). Although the trial judge mentioned the process of jury selection, there was no mention of the defendant's participation therein. Indeed, the trial judge indicated that the defendant's attorney and the State's attorney would select the jury. The defendant indicated that he had an opportunity to discuss the issue with counsel, and a written waiver was filed. The reviewing court found this colloquy sufficient. Id. at 556-559.

As the foregoing authority establishes, Washington courts have long recognized that the right to a trial by jury can be waived, and there is no particular "laundry list" of rights into which the trial court must inquire. Indeed, the list of rights the defendant asserts must be acknowledged has specifically been rejected in *State v. Pierce.*

The Court's ruling in *State v. Pierce* controls in this case. *State v. Pierce,* 134 Wn.App. 763, 142 P.3d 610 (2006).

The *Pierce* court held that:

> A written waiver, as CrR 6.1(a) requires, is not determinative but is strong evidence that the defendant validly waived the jury trial right. *State v. Woo Won Choi*, 55 Wash.App. 895, 904, 781 P.2d 505. An attorney's

> representation that his client knowingly, intelligently, and voluntarily relinquished his jury trial rights is also relevant. *Woo Won Choi*, 55 Wash.App. at 904, 781 P.2d 505. Courts have not required an extended colloquy on the record. *Stegall*, 124 Wash.2d at 725, 881 P.2d 979; *State v. Brand*, 55 Wash.App. 780, 785, 780 P.2d 894 (1989). Instead, Washington requires only a personal expression of waiver from the defendant. *Stegall*, 124 Wash.2d at 725, 881 P.2d 979.

State v. Pierce, 134 Wash.App. 763, 771, 142 P.3d 610, 613 - 614 (2006).

This case should be decided in the same manner as *Pierce*. The defendant in this case executed a proper written waiver as required by CrR 6.1(a). Supp. CP. Further, the court went over this written waiver with the defendant in open court. 5/11/11 RP at 6-9. During this hearing, the defendant acknowledged that he understood the waiver, that he had discussed it with counsel, and that he had no further questions. 5/11/11 RP at 6-9.

D. Additional assignments of error.

The appellant lists assignments of error alleging that the trial court erred by entering findings and conclusions relating to assignments of error 5 and 7. However, there is no argument or authority offered to support these specific assignments. Therefore, the State asks that they not be considered. The Court will not consider an assignment of error that is unsupported by argument or citation of authority. See RAP 10.3(a)(6); *State v. Farmer*, 116 Wn.2d 414, 433, 805 P.2d 200 (1991).

III. CONCLUSION

For the reasons stated above, the State asks this Court to affirm the verdict of the trial court.

DATED this 1st day of June, 2012,

Respectfully Submitted,

By: _____
KATHERINE L. SVOBODA
Sr. Deputy Prosecuting Attorney
WSBA # 34097

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, v. TALYN BENITEZ, Appellant.	No.: 42420-7-II **DECLARATION OF MAILING**

DECLARATION

I, Randi M. Tuyra hereby declare as follows:

On the 1st day of June, 2012, I mailed a copy of the Brief of Respondent to Jodi R. Backlund and Manek R. Mistry, Backlund & Mistry, P. O. Box 6490, Olympia, WA 98507, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 1st day of June, 2012, at Montesano, Washington.

Randi M. Tuyra

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